Caruso and Ciresi, Inc. and Patrick Lowe. Case 9-CA-17670

19 March 1984

DECISION AND ORDER

By Chairman Dotson and Members Zimmerman and Hunter

On 14 January 1983 Administrative Law Judge Hubert E. Lott issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The Respondent excepts, inter alia, to the judge's conclusion that it violated the Act by discharging Patrick Lowe for attempting to file a grievance, contending that this issue was not properly before the judge. Specifically, the Respondent asserts that this violation was not alleged in the General Counsel's complaint or in the amended complaint, and therefore it cannot be a proper basis for an unfair labor practice finding. We disagree, as this issue was fully litigated at the hearing and the record fully supports the finding of a violation.

The judge found, and we agree, that Lowe was discharged for complaining to the Respondent that he had not been assigned a 40-hour workweek, as required by the collective-bargaining agreement, and that he was called in to work for only 1 hour. In so complaining, Lowe was implementing the contract's grievance procedure. The Respondent's discharge of Lowe for engaging in this protected activity is a violation of Section 8(a)(1) of the Act.²

¹ Sec. 24.03 of the agreement, which sets forth the grievance procedure, states: "STEP ONE: If there is an employee (or employees) aggrieved he shall first attempt to settle the grievance with his foreman (or supervisor) within three (3) working days after the occurrence thereof."

Lowe acted on instructions from the Union's business representative.
² Ad Art, Inc., 238 NLRB 1124, 1131 (1978), enfd. 645 F.2d 669 (9th Cir. 1980). Bowman Transportation, 134 NLRB 1419, 1431 (1961), enfd. as modified 314 F.2d 497 (5th Cir. 1963).

Chairman Dotson would find that this conduct violates Sec. 8(a)(3) of the Act. Hacienda Hotel & Casino, 254 NLRB 56 (1981), enfd. mem. 676 F.2d 709 (9th Cir. 1982); Bowman Transportation, supra. Although there is no 8(a)(3) allegation in the complaint and the General Counsel has not filed exceptions to the judge's decision, the matter has been fully litigated, and the facts support the finding of a violation under Sec. 8(a)(3). See Vulcan-Hart Corp., 263 NLRB 477 (1982). The Chairman would not rely on Interboro Contractors, 157 NLRB 1295 (1966), enfd. 338 F.2d 495 (2d Cir. 1967), or its rationale to find a violation here. The Chairman would rely on the fact that such activity is union activity.

In light of this conclusion, we find it unnecessary to pass, and we do not pass, on the judge's further conclusion that Lowe was discharged for activity protected under *Interboro Contractors*, supra, and its progeny.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 3.

"3. By discharging Patrick Lowe on August 11 for attempting to file a grievance, Respondent violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Caruso and Ciresi, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

- 1. Substitute the following for paragraph 1(a).
- "(a) Discharging employees or discriminating against them with regard to hire, job tenure, or terms and conditions of employment, for attempting to file grievances pursuant to the collective-bargaining agreement with Union."
 - 2. Substitute the following for paragraph 2(a).
- "(a) Offer Patrick Lowe immediate and full reinstatement to his former position or, if that position no longer exists, to some substantially equivalent position, and make him whole for any loss of pay he may have suffered by reason of the discrimination practiced against him, with interest."
- 3. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.
- "(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."
- 4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees or discriminate against them with regard to hire, job tenure, or terms and conditions of employment, for attempting to file grievances pursuant to the collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Patrick Lowe immediate and full reinstatement to his former position or, if that position no longer exists, to some substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of his discharge, with interest.

WE WILL expunge from our files any reference to the discharge of Patrick Lowe on 11 August 1981 and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against him.

CARUSO & CIRESI, INC.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was tried at Cincinnati, Ohio, on September 17, 1982, on an unfair labor practice charge filed on November 13, 1981, by Patrick Lowe, an individual, against Caruso & Ciresi, Inc. (Respondent), and on a complaint issued by the General Counsel on December 15. The issue in this case is whether or not Patrick Lowe was discharged for unsatisfactory work performance or for attempting to enforce a provision of the collective-bargaining agreement in violation of Section 8(a)(1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of parties' initial briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, an Ohio corporation, is engaged in the wholesale distribution of produce from its Cincinnati, Ohio facility. It annually purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of Ohio. The Company admits, and I find, that it is an employer engaging in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Company further admits that the Bakery, Crackers, Pie and Yeast Drivers and Chauffeurs, Local Union No. 114, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent and the Union have a collective-bargaining agreement containing a grievance procedure which provides under the first step that the aggrieved employee attempt to settle the grievance with his supervisor. The agreement also guarantees truckdrivers, loaders, and unloaders 40 hours of work per week. It further provides that employees called to work shall be paid from the time that employee reports for work and shall receive a minimum of 5 consecutive hours or pay therefor.

The Union has no shop stewards in Respondent's facility. At the time of his discharge Patrick Lowe who, among other things, did truckdriving and loading work, was a member of the Union and was covered by the terms of the collective-bargaining agreement.

B. The General Counsel's Position and Supportive Evidence

Patrick Lowe testified that he began work for Respondent on January 29 as a salaried mechanic. After 2 weeks Lowe was performing unit work so he asked Dan Garrett, Respondent's president, if he could join the Union because unit work paid more than he was earning. Garrett agreed and Lowe entered his probationary period which lasted 90 days. Lowe finished his probationary period around the end of May. At the end of his probationary period Lowe talked to Steve Caruso, operations manager, about working a 40-hour week. In July he again talked to Caruso about becoming a full-time employee.2 Caruso told Lowe that he would make arrangements for Lowe to complete the union application card and other forms to accomplish this. The next day Lowe completed the required forms. Sometime after this, Lowe noticed that employees having less seniority appeared to be working more hours because they were at work when he reported and they were working after he left work. During this same period which was in July and August, he spoke to Bill Dempsey, a stipulated employee, about

¹ All dates refer to 1981 unless otherwise indicated.

² Lowe was a part-time, on-call employee apparently throughout his term of employment.

his problem. Dempsey told him that under the contract, he should be guaranteed 40 hours per week, and that he should speak to Dan Garrett about it.³

On August 11 at 10:30 a.m., Lowe received a call from Caruso to report to work. He arrived at Respondent's facility at 11 a.m.; however, Caruso told him not to punch in because he did not need him just then. Lowe was upset at this because Respondent normally closes at 1 p.m., and he noticed that employees with less seniority were working when he arrived. While he was waiting to punch in, Lowe called Roger Insprucker, the Union's business representative, and explained his grievance to him. Insprucker advised Lowe to take his grievance to Caruso in an effort to resolve it and to report the outcome to him. Lowe was allowed to punch in at 12 noon. At that time he talked to Caruso alone at icebox 4 where he told him that he did not think it was fair to call him in at 11 a.m. and not let him punch in until 12 noon. He further told Caruso that he thought it was unfair to allow employees with less seniority to work more hours than he was working. Caruso responded by saying, "Well, you don't think it's fair?" When Lowe said no, Caruso said, "Hit the fucking time clock and get your ass off the premises." Lowe further testified that nothing was said during this conversation about his work performance and that he punched out about 12:05 p.m. and called Insprucker and told him that, when he talked to Caruso about his problem, Caruso got mad and fired him.4

On August 12, Lowe filed a written grievance which repeats Lowe's version of what transpired between himself and Caruso on August 11. This grievance was subsequently withdrawn by Insprucker who advised Lowe to file a charge with the National Labor Relations Board.

Approximately 1 week later a grievance meeting was held between Insprucker, Lowe, Caruso, and Garrett. Insprucker and Lowe testified that, when Insprucker asked Garrett why Lowe was discharged, Garrett handed Insprucker a written reprimand dated June 19 (G.C. Exh. 3) and Lowe's attendance record. Lowe explained that, when he received the written reprimand, he told Caruso that some of the complaints on the reprimand were not his fault and Caruso agreed and told him not to worry about it. Lowe also explained that, because he was never given his regular hours but was always on call, he was sometimes late in reporting to work after receiving a telephone call. Garrett also stated that Lowe had an attitude change. When Insprucker asked what had happened on August 11 that caused Lowe's discharge, Garrett and Caruso stated that business was slow and they were trying to keep 27 employees working and did not need Lowe complaining about his hours, that his action on August 11 was the last straw, and that other employees were complaining about him. Lowe testified on rebuttal that nothing was mentioned in this meeting about him refusing to bag potatoes on August 11. He further admitted that when he registered his complaints concerning hours worked during all times material herein, he was acting strictly for himself and in his own helalf

The General Counsel argues in brief that Lowe was discharged for attempting to enforce the terms of the collective-bargaining agreement citing Interboro Contractors, 157 NLRB 1295 (1966). She argues that Lowe was attempting to enforce the 40-hour guarantee established for full-time employees, which necessarily would be a concern of all employees. The General Counsel also stresses the point that an employee need not refer to the applicable contract provision or have the correct interpretation of any provision of the agreement but only have an honest belief that his interpretation is correct. It is the General Counsel's contention that Lowe honestly believed that he should receive the 40-hour guarantee provided by the contract after he completed his probationary period and that he was discharged in violation of Section 8(a)(1) of the Act for attempting to secure this contractual right.

The General Counsel further argues that Lowe was pursuing the first step of the grievance procedure when he addressed Caruso about his hours and the Act protects an employee engaged in such activity. The General Counsel disputes Respondent's reasons for discharging Lowe claiming that they are pretextual. In support of this argument she claims that Caruso's testimony should not be credited over that of her witnesses. Also in support of this argument she points to the evidence offered by her that several employees who received more warnings than Lowe are still employed by Respondent.

C. Respondent's Position and Supportive Evidence

Steve Caruso testified initially that Lowe was discharged for unsatisfactory work performance and that he could not recall whether he told Lowe the reasons for his discharge. Later, he testified that he did give Lowe the reasons for being discharged. He further testified that Lowe never complained to him about his hours and that he first became aware of Lowe's dissatisfaction at his grievance meeting.

Caruso testified that, on August 11, he asked Lowe to bag some potatoes in refrigerator box 4. When Lowe asked why he had to do that kind of work, Caruso discharged him.⁵ Caruso stated that this incident combined with his poor work record were the reasons for Lowe's discharge. According to Caruso, Lowe had a poor work record. His personnel file contained a truck damage report dated May 14 which reported some minor damage to one of Respondent's trucks. There was also a fuel ticket signed by Lowe dated May 29 that had no truck number on it. His file also contained an incorrect receiving report signed by Lowe and dated June 8 and a trip report dated June 12 that did not indicate time of return. His file also contained a written warning report dated June 19 wherein Lowe was reprimanded for: not inspecting the quality of peaches, loading a truck with wrong produce, delivering seven items to the wrong customer,

³ Dempsey corroborates Lowe's testimony. He further testified that they had several conversations about Lowe's problems during the summer and that Dempsey brought Lowe's problem to the attention of Caruso during this same time period.

⁴ Roger Insprucker corroborated the testimony of Lowe concerning both telephone conversations.

⁵ Lowe placed this incident some 2 to 3 weeks prior to his discharge.

and leaving merchandise and equipment on a truck. Lowe had another warning report in his file dated August 6 for failing to return both copies of a sales ticket to Respondent.⁶

Caruso admitted that other employees such as Robert Craddock, Bill Dempsey, John Jefferson, and Toby Stollers had received more warning reports than Lowe and were still employed by Respondent. Caruso testified at one point that he did not tell Insprucker at the grievance meeting that the contents, i.e., Lowe was discharged for complaining about his hours, of Lowe's grievance were untrue. Later, he testified that he did state that it was untrue although he could not remember what he said or anything else that was stated at the grievance meeting.

Respondent offered evidence that Lowe was at all times material a part-time employee, working an average of 36.36 hours per week.

Respondent's counsel argues in brief that the activities of Lowe in this case are similar to those of Chandler in Comet Fast Freight, 262 NLRB 430 (1982). He further argues that Lowe was a part-time employee not covered by the scheduling provisions of the contract and, since he admitted acting alone, he should be denied protection under the Act. He also argues that the General Counsel did not satisfy its Wright Line burden of proving that Lowe would not have been discharged but for his protected concerted activities and that Respondent satisfied its burden of demonstrating that Lowe would have been discharged even in the absence of his protected activity.

D. Analysis and Conclusions

In deciding the credibility issues in this case I have credited corroborated testimony of the General Counsel's witnesses over the uncorroborated evasive and contradictory testimony of Caruso.

The evidence is clear that Lowe from the very beginning of his employment wanted to become a full-time employee, covered by the collective-bargaining agreement. He took, with the aid of management, all the necessary steps to accomplish this goal. After fulfilling all the requirements for full-time employment, there is ample evidence that he believed he was entitled to a 40hour week guarantee. There is also evidence that, although he was unaware of the contract provision, he felt he was being treated unfairly with respect to reporting to work and not being allowed to begin work. With facts established as background, there is little doubt that, on August 11, Lowe complained about these things to Caruso after checking with his business representative. Aside from Caruso's lack of credibility over the events of that day, it is also important to note that the potato bagging incident was never mentioned as the reason for Lowe's discharge at any time other than at the trial. It was never mentioned in Respondent's position statement to the Board during investigation nor was it mentioned to Lowe at the time of his discharge or at the grievance meeting. To the contrary, I find that at the grievance meeting all parties present agreed that Lowe was discharged for complaining about his hours of work and the reporting procedure.

After having made these findings, I conclude that Lowe was discharged for legitimately attempting to enforce the terms of the collective-bargaining agreement and for attempting to file a grievance in accordance with the contract. The first right is protected under *Interboro Contractors*, supra, and *Adams Delivery Service*, 237 NLRB 1411 (1978). The latter right has been protected under longstanding Board law.

Having found that Respondent's reasons for discharging Lowe were pretextual, I find that the General Counsel has satisfied its *Wright Line* burden and Respondent has not.

Accordingly, I find that Patrick Lowe was discharged for engaging in protected concerted activity in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By discharging Patrick Lowe on August 11, for engaging in protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.
- 4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 5. Except as found above, Respondent has not engaged in other unfair labor practices.

THE REMEDY

Having found that the Company has engaged in and is engaging in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take the affirmative action necessary to effectuate the purposes of the Act. Said backpay is to be computed in the manner prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950), and Florida Steel Corp., 231 NLRB 651 (1977). See generally Isis Plumbing Co., 138 NLRB 716 (1962).

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended 7

ORDER

The Respondent, Caruso & Ciresi, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Discharging employees or discriminating in any like or related manner with regard to their hire, job tenure, or the terms and conditions of their employment,

⁶ The evidence indicates that, with the exception of the June 19 warning report, none of the other documents were ever shown to Lowe. His attendance record was never discussed with him and he was never told that his job was in jeopardy if he did not improve.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

because of their determination to press complaints or grievances based on provisions in their union collectivebargaining contract or because of their participation in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

- (b) Interfering with, restraining, or coercing its employees in any like or related manner, with respect to their exercise of rights under Section 7 of the Act.
- 2. Take the following affirmative action designed to effectuate the policies of the Act.
- (a) Offer Patrick Lowe immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position and make him whole for any loss of pay he may have suffered by reason of the discrinination against him.
- (b) Expunge from its files any reference to the discharge of Patrick Lowe on August 11, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against him.
- (c) Post at its Cincinnati, Ohio facility copies of the attached notice marked "Appendix." Copies of said notice on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained by the Respondent for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.
- (d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."